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Cases and Materials on Remedies

prepared by
Robert J. Sharpe

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REMEDIES

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Introduction

This course explores the middle ground between procedure, on the one hand, and substantive law, on the other. If we take procedure to refer to society's mechanisms for the resolution of disputes, ultimately the mechanics of litigation; and substantive law to be the definition of rights between individuals in their relations with each other and the state, then remedial law refers to the techniques available for the translation of substantive rights into concrete or practical terms.

Remedial choices may be roughly classified as being constitutive, substitutionary, or specific.

A constitutive remedy is one which itself declares a certain state of affairs or status. It requires no further implementation: the very fact of the judgment itself produces the desired remedy. As we shall see, except in specific areas, such as divorce, the constitutive or declaratory approach is not one with which the courts are at ease. The instinct produced by the common law tradition is to shrink from general statements or declarations of rights, and to opt for a more specific and concrete response.

The presumptive remedy in our tradition is substitutionary: damages. We aim to put the injured or wronged party in the position he would have been insofar as money will allow. Time permits us to spend little, if any, time on the basic issues in the law of damages. These matters tend to be fully explored in first year courses in Contracts and Torts. However, since damages is the presumptive remedy, we will constantly have to deal with the underlying policies and purposes of the law of damages although our focus will be on specific remedies.

It is where damages fail to achieve this goal that specific relief is available. A specific remedy is one that gives the plaintiff the very thing he bargained for, restores property or rights to the state existing before the defendant's wrongful invasion, or protects the plaintiff's position from threatened harm. We will focus on the issues of specific relief for most of this course. A recurrent theme here is the impact of history.

Are the historic principles governing equitable relief, the product of a now forgotten struggle between two courts vying for control within a single state, still to govern us? Maitland told us in the context of the common law that although dead, the forms of action still rule us from their graves. We shall see that to some extent, equity has its own ghosts of the past. We must ask, then, whether constraints historically imposed upon remedial choices remain valid today.